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MEREDITH et al. v. TRIPLE ISLAND GUNNING CLUB, Inc.

Jan. 18, 1912.

[73 S. E. 721.]

1. Game (§ 2½*)—Right of Fowling—Common-Law Privileges.—Code 1904, § 2070a, and Acts 1901-02, p. 107, in force in the county of Princess Anne, designed to regulate the killing of game for the benefit of all the citizens of the commonwealth, and Code 1904, § 1338, declaring that all the beds of the bays, rivers, creeks, and the shores of the sea within the jurisdiction of the commonwealth and not specially granted shall continue the property of the commonwealth, and may be used as a common by all the people for the purpose of fishing and fowling, are not arbitrary assumptions of power on the part of the commonwealth, but are declaratory of the common law.

[Ed. Note.—For other cases, see Game, Dec. Dig. § 2½.* 10 Va.-W. Va. Enc. Dig. 343.]

2. Injunction (§ 103*)—Subjects of Relief—Criminal Acts.—Equity will not enjoin a violation of Code 1904, §§ 1338, 2070a, or Acts 1901-02, p. 107, in force in the county of Princess Anne, declaring that the beds of bays, creeks, and the shores of the sea not specially granted according to law, may be used as a common by all the people of the commonwealth for the purpose of fowling, etc., and protecting such right by making a violation subject to penalties, since equity will not restrain the commission of public offenses.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 176, 177; Dec. Dig. § 103.* 7 Va.-W. Va. Enc. Dig. 524.]

3. Injunction (§ 9*)—Rights Protected—Fowling on Navigable Waters.—A gunning club acquired title to an island situated in a bay and valuable for shooting, and defendants obtained title to an island of about two square rods situated in the middle of a channel between the island belonging to the club and other islands and in a position to intercept files of ducks flying over the bay so as to prevent them from coming within range of the club's premises. Held, in the club's action for an injunction, alleging irreparable injury to its hunting rights, but no malicious interference therewith, that, in view of the rights of all citizens to shoot upon navigable waters in the jurisdiction of the commonwealth, equity would not restrain defendants' use of their island; the injury to the club being *damnum absque injuria*.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 9.* 7 Va.-W. Va. Enc. Dig. 522.]

4. Public Lands (§ 183*)—Grants by State—Repeal at Suit of Private Owner.—Under Code 1904, § 2368, which provides that the commonwealth, or any other party desiring to repeal any grant of land

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

because obtained to the prejudice of such party's equitable right, may file a bill in equity for that purpose, no private citizen can maintain a suit to set aside such grant unless he can show that he has some right therein which is prejudiced by the grant.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 183.* 11 Va.-W. Va. Enc. Dig. 454.]

5. Nuisance (§ 72*)—Public Nuisance—Remedy of Private Person.

—Where acts constitute a public nuisance, a private person who has only suffered with the general public cannot complain thereof.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164-169; Dec. Dig. § 72.* 10 Va.-W. Va. Enc. Dig. 538.]

Appeal from Circuit Court, Princess Anne County.

Action for an injunction by the Triple Island Gunning Club, Incorporated, against William B. Meredith and others. From a decree perpetually enjoining defendants, they appeal. Reversed.

D. H. & Walter Leake and Scott, Buchanan & Cardwell, for appellants.

Loyall, Taylor & White and A. Johnston Ackiss, for appellee.

SOUTHERN RY. CO. *v.* McMENAMIN et al.

Jan. 18, 1912. Rehearing Denied March 14, 1912.

[73 S. E. 980.]

1. Appeal and Error (§ 959*)—Review—Harmless Error—Pleading.

—The allowance of an amendment before defendant had pleaded which did not change the cause of action could not have prejudiced defendant, where the trial was then postponed for two months.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825-3833; Dec. Dig. § 959.* 1 Va.-W. Va. Enc. Dig. 587.]

2. Railroads (§ 222*)—Operation—Nuisance—Action—Pleading.—

In selecting a place for its yards and coal chutes and power house, a railroad is acting in its private capacity, such acts being mere incidents to the operation of the road, in which the public has no concern, and so, if the yards and coal chutes constitute a nuisance, it is unnecessary to allege or prove negligence.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 222.* 10 Va.-W. Va. Enc. Dig. 522.]

3. Nuisance (§ 53*)—Actions—Damages—Evidence.—

In an action for maintaining a smoke nuisance near plaintiff's residence, where the jury viewed the premises and the evidence fully showed the character of the injury complained of, the question of damages was properly

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